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Proposed Bill 446
Public Hearing: 2-19-13

TO: **MEMBERS OF THE INSURANCE AND REAL ESTATE COMMITTEE**
FROM: CONNECTICUT TRIAL LAWYERS ASSOCIATION (CTLA)
DATE: FEBRUARY 19, 2013

RE: **OPPOSITION TO PROPOSED BILL 446 – AN ACT CONCERNING HEALTH INSURANCE COVERAGE AND TORT REFORM**

Absent a proven crisis to justify the enactment of draconian tort reform measures, the Connecticut Trial Lawyers Association finds no satisfactory reasons for the separate and unequal treatment tort reform imposes on medical malpractice victims.

It should be noted, absent specific legislative language on which to comment, we have included below only portions of recent empirical evidence addressing the subjects advanced in the many tort reform proposals this session. The below will address the impact of these proposals on medical malpractice victims and the minimal impact of medical malpractice on the cost and delivery of healthcare. These studies and others will be made available to the Committee upon request.

At the beginning of this legislative session, nearly one dozen proposed bills delivered a striking display of proposed alternatives to the civil justice system. While none of these alternatives promise to deliver benefits that are not already achieved through the civil justice system, they do share one common theme; doctors avoiding accountability.

Cost of Healthcare

Numerous studies have been conducted that have debunked the notion that healthcare costs can be saved by stripping away patient's legal rights through tort reform. In 2012 writing for the Journal of Empirical Legal Studies; Professors Charles Silver, David Hyman and Myungho Paik, examined Medicare spending after Texas enacted some of the most draconian tort reforms in the United States. Their findings; with severe "caps" on damages there was no evidence of a decline in healthcare spending.

According to the consumer group Texas Watch, "Medicare spending has increased 16% faster than the national average since Texas restricted the legal rights of patient's. Family health insurance premiums for insured Texan's are up 92% - more than 4.5 times faster than income."

In 2012, Cornell University Professor Theodore Eisenberg, found that "tort reform" provides little in the way of healthcare savings: "one recent summary concludes 'accumulation of recent evidence finding zero or small effects". Professor Eisenberg goes on to suggest "...that it's time for policymakers to abandon the hope that tort reform can be a major element in healthcare cost control.'"

Physician Supply

Looking at Texas again – In his "Does Tort Reform Affect Physician Supply - Evidence from Texas" David Hyman, Professor of Law and Medicine, University of Illinois College of Law, found, "[T]he assertion by tort reform proponents that Texas experienced an 'amazing turn around' after suffering an 'exodus of doctors from 2001 through 2003' is doubly false. There was neither an exodus before reform nor a dramatic increase after reform." "Tort reform did not solve Texas physician supply issues."

Medical Screening Panels

These panels would require injured patient's to have their case evaluated for merit by a medical screening panel before a lawsuit can be filed.

There is little historical evidence that adopting screening panels would improve on the medical liability system. At least seven states have repealed their panels and courts have overturned statutes in five others. Furthermore, research has found no evidence that screening panels reduce the size of payments or physician premiums and alternatively reduce the cost of health care.

These panels are vulnerable to abuse much the same way that disciplinary and error reporting requirements are evaded by hospitals, as we've seen here in Connecticut. Though most of these proposals aim to include medical experts, legal experts and community representatives, there is still the possibility that the balance of the panel could tip in one party's favor. Nor do these proposals clarify who is responsible for choosing panel members and what qualifications these members must have.

Screening panels have been found to be cumbersome and unpredictable. After calling for a review of the Maine medical malpractice screening panel scheme, Maine Chief Justice Leigh Saufley found that Maine's panel scheme represented a "two trial" system "...a cumbersome process with unpredictable results that cost the plaintiffs and defendant's money and time in a way that was not intended by the legislature."

In 2003, FPIC the largest medical malpractice carrier in Florida testified against screening panels before the State Department of Health. FPIC believed such panels would add to the cost of litigation and their official position was "opposed." The Department tabled the recommendation as Maine hospitals also expressed concern.

Mandatory Binding Arbitration Panels

Connecticut has a strong state constitutional right to trial by jury in civil cases. But mandatory binding arbitration forces injured patients and consumers to sign away this legal right, and with it, the ability to hold a wrongdoer accountable in court.

The startling lack of adequate regulation around the use of mandatory binding arbitration for injured patients, consumers and employees has led to abusive, unfair results. Medical malpractice insurance providers may delay malpractice arbitration proceedings at their leisure – sometimes, until a patient dies. . Without more intense oversight and regulation, mandatory binding arbitration threatens some of the most important consumer safety mechanisms provided within our civil justice system.

Practice Guidelines

Physicians are expected to adhere to certain standards of treatment in their medical practices. These clinical practice guidelines of appropriate treatment are developed by healthcare experts and are generally understood to set the minimum standard of care. Recently, advocates for these proposals have attempted to use these guidelines as a legal standard of care in malpractice cases.

Research suggests that these guidelines do not significantly alter physician behavior and that physicians struggle to adhere to them and, as many as 16% of physicians refuse to follow them at all. For instance, guidelines for mammograms were formally rejected by 40 leading medical centers within 48 hours of their introduction.

There are many reasons preventing physicians from following practice guidelines, the most frequent is the lack of agreement that the guideline is an appropriate treatment for the condition.

Restrictions on Expert Witnesses

Enacting expert witness restrictions is listed among the AMA's Top Five "Innovative" reform ideas to help curb medical malpractice litigation. The real purpose behind these proposals is to attack the few doctors who are committed to accountability.

Because of the "code of silence" in the medical community, it is already quite difficult for victim's of medical malpractice to find a qualified expert who is willing to testify against a physician who practices in the same state, community or hospital.

For this reason patients will often use out of state physician experts and highly specialized medical expert witnesses are extraordinarily hard to find. Consequently, malpractice defendants have an unfair advantage over patients because negligent physicians have no difficulty in finding an in-state defense expert.

The playing field is already uneven for patients.

Offers of Compromise are meant to encourage pretrial settlements and save judicial resources and costly litigation. In order to achieve this goal, the interest rates need to be maintained at the current rate of eight per cent per annum. Conn. Gen. Stat. § 52-192a. Any further reduction in the interest rate will defeat the purpose of the statute, insofar as insurance companies will have no incentive to settle cases.

Changes to Offer of Compromise and Post Judgment Interest Rates

Insurance companies set aside large amounts of reserves to pay claims. During the pendency of the claim, the companies invest these reserves, realizing huge profits. Companies typically yield extremely favorable returns on their investments, due to the economies associated with the large amount of the funds they are investing. If the offer of compromise is lowered below the current rate of eight per cent, the insurance companies will have no incentive to settle a claim. Very simply, they will be able to realize a greater rate of return on their reserve investments, and it will work to their advantage in not settling cases.

Under the Connecticut Unfair Insurances Practices Act, insurance companies have a statutory duty to effectuate prompt, fair and equitable settlement of claims. Conn. Gen. Stat. § 38a-816. If an insurer follows this statutory mandate, then the insurer has nothing to fear from an offer of compromise. Since the case law has rendered the CUIPA statute extremely difficult to enforce, the offer of compromise statute is one of the few enforcement mechanisms left to ensure that claims are settled promptly and fairly. The CTLA urges the legislature to preserve this important procedural rule at the current interest rate.

CTLA Strongly Opposes Proposed Bill 446 and Any Changes to The Tort System That Would Have A Negative Effect on the Rights of Victims of Malpractice to Access our Courts.

Please reject proposed bill 446 and any changes to the civil justice system that will deny victims of malpractice or any other tort from access to the courts and fair and equitable compensation for their injuries. There is no proof that these changes will lower healthcare costs as posited by the proposal, and there is copious amounts of proof that the changes would hurt the injured patients.